In the Supreme Court of the United States

October Term, 1945.

No. [redacted] 116

Walton-Viking Company, a Corporation, *Petitioner*,

vs.

Walter Kidde & Company, Inc., a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

Petitioner prays certiorari to review a judgment of the Eighth Federal Circuit entered March 11, 1946 (R. 432).

Summary of the Matter Involved.

In an action at law, tried without a jury, before the Honorable John C. Collett, in the United States District Court for the Western Division of the Western District of Missouri, plaintiff (petitioner) sought and recovered against defendant (respondent) a judgment for $53,750.33 as and for commissions to plaintiff as distributor-agent for bringing about the sale of 10,800 portable fire ex-

tinguishers of defendant's manufacture. On appeal, by a divided opinion, the Eighth Circuit (Judge John B. Sanborn writing, Judge Joseph W. Woodrough concurring, Judge Harvey M. Johnsen dissenting) the trial court's judgment was reversed outright and remanded with directions to enter judgment for the defendant for $484.07. The controversy concerns the proper method of computing plaintiff's commissions under a written agency agreement.

Opinions Below.

Judge Collet's judgment (R. 41) was supported by full fact findings (R. 28-37) and conclusions of law (R. 38-41); the majority and dissenting opinions of the Eighth Circuit, not yet reported, were filed March 11, 1946 (R. 423-433).

Jurisdiction.

The suit, filed in a Missouri state court, was removed by defendant because it was a New Jersey and plaintiff was a Missouri corporation, and the jurisdictional amount was involved (R. 6-10). In the court below plaintiff's petition for rehearing, filed March 26, 1946 (R. 446), was denied April 12, 1946 (R. 447), and a motion to stay the mandate, filed April 22, 1946 (R. 447), was sustained April 24, 1946 (R. 448). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Defendant, a manufacturer (by form contract prepared by it) appointed plaintiff its exclusive agent for one year to sell in a specified territory defendant's products, on a commission basis, represented by the difference between

the contract price to customers and a published schedule of prices to the agent. The contract further provided that the commission schedules were subject to change without advance notice and that defendant reserved the right "to alter them if necessary to meet any unusual conditions not specifically covered." Defendant marketed its products through agents in two ways: (1) by ordinary orders, and (2) by "annual purchase contracts" (which defendant urged and encouraged agents to procure), obligating the purchaser to buy a minimum number of products during the period of a year at fixed prices, with the option of purchasing during the period as many more as he needed at contract prices. Plaintiff negotiated such an annual purchase contract, calling for a minimum of 750 fire extinguishers of any model and as many more as the purchaser ordered during the year, all at fixed prices, under which the purchaser ordered 10,800 extinguishers, all of which were delivered and paid for at contract prices. *After* the agent had negotiated this contract the manufacturer first cut the commissions in half, and later to a small fraction thereof, by increases in the scheduled prices to agents. The agency agreement provided that it was to be interpreted by the laws of New Jersey. *Quaere*—

(1) Was the trial court right in ruling that plaintiff *earned* its commissions on all 10,800 extinguishers when it negotiated the annual purchase contract and was therefore entitled to be paid on the basis of defendant's schedule of commissions then in effect?

(2) Were Judge Collet, of the trial court, and Judge Johnsen, of the appellate court, correct in holding that in any event the agency agreement was ambiguous as applied to the purchasers' optional orders; and that the contemporaneous interpretation of the agreement for almost a year by both plaintiff and defendant, during the

period when all 10,800 orders were received, controlled and settled the meaning of the agency agreement?

(3) Plaintiff having been employed to procure a contract providing for both firm and optional orders, and having produced what it was employed to procure, did the majority opinion of the court below err in failing to distinguish between commissions *earned* and commissions *accrued*, and in ruling that defendant had the absolute right to apply the reduced commission schedules to all such orders subsequently given?

(4) If defendant had the right to reduce plaintiff's commissions on the optional orders, was the reserved right absolute or conditional; and if conditional, was defendant justified in reducing commissions (1) because the orders procured were war orders, (2) because less sales effort was necessary, (3) because defendant feared renegotiation and was afterwards renegotiated?

(5) Assuming that defendant, a subcontractor of a war contract, was subject to renegotiation, did the "Renegotiation Act" of April 28, 1942, as amended, empower defendant to "renegotiate" plaintiff, on the theory that the contract commissions might be found to be unreasonable or excessive?

(6) If defendant had the right to reduce plaintiff's commissions on the optional orders, then, whether the right was conditional or absolute, was defendant bound by the law to exercise that right in good faith; and was it good faith where defendant, instead of passing to the purchaser the benefit of the reduced commissions, appropriated the reductions to itself?

Reasons for the Allowance of the Writ.

(a) Under defendant's split commission policy, the $53,750.33 here in dispute represents only plaintiff's one-half of a total disputed commission of $107,500.66. On July 21, 1941, when plaintiff negotiated the annual purchase contract in question, defendant had in force between 300 and 350 other annual purchase contracts, procured by other agents (R. 234) operating under the same type of agency contract and the same schedules of commissions (Judge Collet's Finding No. 16, R. 35-36; R. 234). When defendant, after the elapse of a year, "recomputed" and reduced plaintiff's commissions by $53,750.33, it made like "adjustments" in all the other cases. Plaintiff "was one of the smaller cases at issue" (R. 220). And while the record disclosed no other pending suits, the decision below has, and the review herein sought will affect the rights of hundreds of other agents, involving, it may fairly be assumed, commissions amounting to many millions of dollars.

(b) The majority opinion (R. 429-431) holds that defendant not only had the absolute right to reduce plaintiff's commissions on orders given by the purchaser after the negotiation of the annual purchase contract, but also that the agency agreement was so clear that the practical interpretation of the parties to the contrary did not and could not affect its meaning. The opinion went further and ruled that the contrary constructions of Judge Collet in the trial court, of Judge Johnsen in the appellate court, and of the parties themselves in interpreting their own agreement, and of 300 other agents and the defendant, in construing like agreements, were in effect so unreasonable as not to admit of a view contrary to that of the majority. And in so ruling, the opinion departed from the

settled law of New Jersey, as announced by these controlling decisions: *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, 91 A. 593 (1914); *Thomsen et al.* v. *Riedel,* 114 N. J. L. 379, 176 A. 701 (1935); *J. I. Kislak, Inc.,* v. *Muller,* 100 N. J. Eq. 110, 135 A. 673 (1927); *Albert* v. *Ford Motor Co.,* 112 N. J. L. 597, 172 A. 379 (1934); *Lippincott* v. *Content,* 123 N. J. L. 277, 8 A. (2d) 362 (1939).

(c) The agency agreement was a form contract, prepared by defendant (Judge Collet's Finding No. 2, R. 28; R. 195-196, 240). Judge Collet found (Concl. II, R. 39) that if the agreement was ambiguous, it should be construed most favorably to plaintiff, since defendant prepared it. The majority opinion construed it most favorably to defendant, and in doing so decided the matter in conflict with the following New Jersey decisions: *Warsley* v. *Brtan,* 114 N. J. L. 36, 174 A. 743 (1934); *Serafino* v. *U. S. Fid. & Guar. Co.,* 122 N. J. L. 294, 4 A. (2d) 850 (1939); *Moran* v. *Fifteenth Ward Bldg. & Loan Ass'n,* 131 N. J. Eq. 361, 25 A. (2d) 426 (1942).

(d) The trial court found (Finding 19, R. 37) that after the purchaser had bought a large number of extinguishers, the defendant decided to "renegotiate" plaintiff's commissions (see also R. 172; 194). Judge Sanborn's opinion rules that defendant had the right, saying (R. 431):

> "Whether the reduction of commissions to agents was of benefit to the defendant or to the government, is not clear. The defendant was subject to the renegotiation of its war contracts and to wartime taxes upon its profits."

In holding in effect that defendant, a subcontractor under a war contract, being subject to renegotiation, had the right under the "Renegotiation Act" (Act of April

28, 1942, c. 247, Tit. IV, §403, 56 Stat. 245, U. S. C. A. Tit. 50, App. Sec. 1191), to renegotiate plaintiff's commissions under the agency agreement, the majority opinion decided an important question of federal law which has not been, but should be, settled by this Court; and has interpreted a federal statute in a way probably in conflict with applicable decisions of this Court.

Specification of Points Relied On.

The majority opinion erred:

(a) In ruling that plaintiff earned no commissions on the purchaser's optional orders under the annual purchase contract.

(b) In ruling that plaintiff earned no commissions on the purchaser's optional orders until the orders were received.

(c) In ruling that the agency agreement, applied to annual purchase contracts, was unambiguous.

(d) In ruling that defendant had the right to reduce plaintiff's commissions after the negotiation of the purchaser's annual purchase contract.

(e) In ruling that the defendant's reserved right to reduce commissions was absolute; or if conditional, that the requisite conditions arose.

(f) In ruling that defendant's actions in reducing commissions and appropriating the reductions to itself was good faith.

(g) In ruling that defendant had the right, under the Act of April 28, 1942 (Renegotiation Act), to renegotiate the agency agreement with plaintiff.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

Statement of the Facts.(1)

For a number of years prior to May 18, 1941, plaintiff had sold defendant's products under annual agency appointments (Finding 2, R. 28, 158, 223-224). On this date plaintiff was again appointed defendant's exclusive distributor-agent to sell its products, including the extinguishers in question, in certain counties in Missouri and Kansas. The agency was for one year (Exhibit I, R. 86-87).

Paragraph 5(a) of the agreement provided:

> "The agent shall be allowed as compensation for performance of its obligations hereunder a commission of an amount in accordance with that set forth in the current commission schedule and current split commission policies furnished to agents by the manufacturer, copies of which have been delivered to and receipt of which is herewith acknowledged by the agent."

The current commission schedule referred to provided:

> "On portable and wheeled extinguishers, your [agent's] commission will be the difference between the sales price [to the customer] and the following schedule, all in accordance with the general policy on split commissions as outlined in the sales manual.

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(1) Judge Collet made his own fact findings. None were challenged by defendant or in Judge Sanborn's opinion. We therefore take our statement largely from those findings, assuming that they will be accepted here. *Boehmer* v. *Pennsylvania R. Co.*, 252 U. S. 496; *Charleston, S. C., Mining & Mfg. Co.* v. *United States*, 273 U. S. 220; *Texas & Pac. Ry. Co.* v. *Railroad Comm. of Louisiana*, 232 U. S. 338. In addition, most of the facts were stipulated (R. 128-143).

"Hand Portables

* * * * * * *

"Model 15	$34.30
"Model 20	41.65"

The last paragraph of the schedule provided:

> "The schedules are subject to change without advance notice and we reserve the right to act as final authority on questions of interpretation, or extension of them or to alter them if necessary to meet any unusual conditions not specifically covered." (Exhibit II, R. between pp. 86 and 87.)

In July, 1941, plaintiff procured for defendant (Finding 5, R. 31; Stip. Par. (4), R. 129; R. 405) from Standard Steel Works of North Kansas City, Missouri, a written "Annual Purchase Contract," signed by defendant and Standard, dated July 21, 1941, whereby Standard agreed to buy a minimum of 750 fire extinguishers between July 21, 1941, and July 21, 1942 (Exhibit III, R. between pp. 86 and 87). The contract contained these provisions:

> "That the Purchaser shall have the option of purchasing at any time within one (1) year from date hereof any increased number (over 750) of such Lux Fire Extinguishers, and
>
> "That the sales prices shall be as listed under the respective quantities corresponding to the total quantity shipped to the Purchaser under this contract, * * *."

The schedule of prices to Standard attached to the agreement was defendant's general price schedule to customers effective April 22, 1941, the same effective date of

the current commission schedules between plaintiff and defendant. However, the general price schedule on Model 15's was reduced by this written language:

> "* * * On a contract for 750 extinguishers the price of the Model 15 will be $43.75."

Between July 21, 1941, and April 28, 1942, Standard purchased 9,800 Model 20 extinguishers at the contract price of $54.74, and 1,000(2) Model 15's at the contract price of $43.75, the total purchase price being $577,925.00 (Stip., Pars. (6), (7), (9) and (10), R. 129-135; R. 123, 408; Stip., R. 136).

Under the current commission schedule plaintiff's commission, represented by one-half the difference between the prices to Standard and to plaintiff, was $6.54 on the Model 20's and $4.73 on the Model 15's (R. 68-69, 76; Exhibits II and III, R. between 86 and 87; R. 200, 241, 409, 410).

Effective August 1, 1941, by a new schedule (Exhibit IV, R. between 86 and 87), received by plaintiff on or before August 1, 1941, defendant, by increasing the prices to agents on the two models, reduced plaintiff's commissions on Model 20's from $6.54 per unit to $2.17 per unit, and on Model 15's from $4.73 per unit to $2.28 per unit (R. 201, Exhibit E, R. 205; Exhibit F, R. 211).

On March 12, 1942, effective March 16, 1942, defendant promulgated another written schedule of commissions (Exhibit V, R. between pp. 86 and 87) which reduced plaintiff's commissions from $6.54 per unit on the 20's to $0.52 per unit, and affected 8,140 Model 20's which were ordered in March and April, 1942 (Stip., Scheds.

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(2) Three hundred of the 1,000 Model 15's were purchased for $36.16 sometime in 1942, the annual purchase contract providing that the purchaser should "derive all benefits from any decline in sales price on any unshipped portion of the contract."

"C" and "D," R. 139-144; R. 221, 242, 244, 257; Exhibit I, R. 225).

In late May or early June, 1942, after all 10,800 units had been ordered by Standard, defendant, having for almost a year computed and paid plaintiff's commissions under Exhibit II[3], recomputed them on all units previously shipped, by applying the schedule in effect when the orders were received, and on all subsequent shipments computed the commissions on the basis of the schedule in effect when the orders were received (Finding 14, R. 34; Finding 19, R. 37).

This recomputation and change in method decreased plaintiff's contractual commissions under Exhibit II $53,750.33 and *increased* defendant's net prices to itself and its profits in double this amount, $107,500.66 (R. 183, 244; Stip., Par. (13), R. 136).

None of the reductions in commissions were passed to Standard, the purchaser (Stip., Par. (12), R. 135-136).

Additional facts may be noted in the argument.

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(3) In addition, both before the execution of the agency agreement and the annual purchase contract and during the terms of these agreements, the defendant, on other annual purchase contracts, computed and paid the agents commissions in accordance with the schedule in effect on the date of each annual purchase contract (Findings 15 and 16, R. 35).

ARGUMENT.

I.

Questions (1), (2) and (3).

The agency agreement was at least ambiguous in its application to annual purchase contracts and the practical construction of the parties governed and settled its meaning.

Construing Exhibits I and II, applied to Exhibit III, Judge Collet ruled as matter of law that plaintiff's *right* to commissions on all 10,800 orders filled under the annual purchase contract was earned and became *fixed* when plaintiff procured the execution of that contract; and that the agency agreement was reasonably clear in its meaning that plaintiff's compensation on all orders was fixed by the contract and the schedule of commissions in effect when the annual purchase contract was negotiated (Concl. I and II, R. 38-39). He concluded also that if the agency agreement was ambiguous, it should be construed most strongly against defendant, who prepared it (Concl. II, R. 39), and he found as facts that continuously and without exception for almost a year following the negotiation of Exhibit III, both plaintiff and defendant interpreted the agreement as he did; and that defendant did not change its position until after Standard had ordered all 10,800 units (Findings 14, 15, 16, 17, 19, R. 34-37). He found also that defendant and other agents under other annual purchase contracts had interpreted the same agency agreement in the same way (Findings, *supra*). The record overwhelmingly supported these findings, and they were accepted in Judge Sanborn's opinion (R. 429).

This language of Judge Johnsen's dissent adds his view (R. 431):

"Whether the right to change the amount of plaintiff's commissions was intended to be applicable to orders placed by a customer pursuant to an executed 'annual purchase contract,' where no reduction in price was made to the customer, or whether in such a situation a change in the commission schedule was intended to be applicable only to annual purchase contracts obtained after the change was put into effect, seems to me to be such an equivocal that any mutual interpretation of the agent's rights made by the parties themselves ought to be accepted as controlling."

Judge Sanborn held that while it is true that defendant had urged plaintiff to procure annual purchase contracts from customers, the written agency agreement obligated defendant to pay commissions upon consummated sales only; that there was nothing in the agency contract or commission schedule to indicate that commissions were to be paid by defendant to plaintiff for obtaining "options to purchase extinguishers"; that a broker employed to sell or procure a purchaser does not earn his commissions by procuring persons to sign an option to purchase and not binding them to purchase; and that plaintiff earned its commission with respect to each purchase order only when the order was placed with defendant (R. 428-429). He then ruled that the contract was not reasonably susceptible of any other interpretation (R. 429) and that the parties' misinterpretation could not be used to render the plain meaning of the contract doubtful (R. 429-430).

Laying aside all other reasons, it seems manifest that the application of the agency agreement to annual purchase contracts and optional orders under them is not clear from the fact alone that two learned federal judges, Judge Collet in the trial court and Judge Johnsen in the appellate court, have interpreted the provisions one way,

and two other learned judges, Judges Sanborn and Woodrough, have interpreted the same provisions in a diametrically opposite way. Add to this that plaintiff and defendant, and defendant and other agents, on 300 or more other annual purchase contracts, had for seven years been continuously interpreting these agreements as entitling agents to commissions fixed by the schedules in effect when these contracts were negotiated, and you crowd out of view the conclusion of the learned majority that the terms of this agreement are so clear as to leave no room for the claim that the practical construction of the parties themselves has settled its meaning.

And there are many weighty reasons which uphold Judge Collet's interpretation and Judge Johnsen's view.

Defendant, the author of the annual purchase contract, placed these agreements in the hands of plaintiff and other agents, and urged them to go out and secure as many as they could (Concl. III, R. 39; Plaintiff's Exhibit XVI, R. 127-128; R. 128).

Judge Sanborn's reasoning falters on an underlying fallacy. It overlooks the fact that in negotiating the Standard contract, with both firm and optional orders, plaintiff produced the very thing it was employed to get. The opinion is, of course, right when it holds that plaintiff earned its commissions with respect to each purchase order when the order was placed with the defendant, *if you apply that language to the ordinary order.* But it is not correct to say that plaintiff, engaged to procure optional orders from a purchaser, has earned nothing in the way of commissions for producing the very result it was employed to obtain.[4] The reason a broker employed

(4) Paragraph 5(a) (Sheet 3) of Exhibit I, the agency agreement (R. 86-87), provides in part:

> "The agent shall be allowed as compensation *for performance of its obligations* hereunder a commission of an amount in accordance with that set forth in the current commission schedule * * *." (Italics ours.)

to procure a sale earns nothing when he brings back an option is that he has not performed his agreement. But plaintiff, engaged to secure option orders, brought back the very thing it was employed to procure, complied with its agreement and earned its commission. No one will deny that if plaintiff's agency had been cancelled the day after it secured the Standard contract that it would be entitled to commissions on all optional orders given by Standard during the ensuing year. Nor will it be contended that plaintiff would not be entitled to commissions on all such orders given by Standard, if they had been secured by the sole efforts of defendant itself. It must be accepted, then, that these commissions were *earned* when the Standard contract was negotiated. It is, of course, true that no commissions were due on any of the 10,800 orders, whether within or above the 750, until the orders were given. But the giving of the orders *accrued* commissions which had been *earned* when the Standard contract was negotiated. Judge Sanborn's opinion fails to take into account the controlling distinction between commissions earned and commissions accrued.

Ambiguity.

That the meaning of the agreement at least lies in doubt, calling for interpretation, is manifest. It is, of course, true as Judge Sanborn wrote, that there is nothing in the agency agreement or the commission schedule which obligates defendant to pay to plaintiff commissions for obtaining options to purchase extinguishers. For that very reason the commission formula of the agency agreement is ambiguous. The commission table dealt with and fitted ordinary purchases only. It did not attempt to fix the rights of the parties where the agent procured a customer's signature to defendant's annual purchase con-

tract. It therefore required construction and interpretation to apply this commission formula to annual purchase contracts. The agreement being ambiguous, the parties' own interpretation controlled and settled its meaning. *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, 91 A. 593 (1914); *Thomsen* v. *Riedel,* 114 N. J. L. 379, 176 A. 701 (1935); *J. I. Kislak, Inc.,* v. *Muller,* 100 N. J. Eq. 110, 135 A. 673 (1927); *Albert* v. *Ford Motor Co.,* 112 N. J. L. 597, 172 A. 379 (1934); *Lippincott* v. *Content,* 123 N. J. L. 277, 8 A. (2d) 362; *Haseltine* v. *Farmers Mut. Fire Ins. Co.,* 263 S. W. 810 (Mo. 1924).

II.

Questions (4), (5) and (6).

If defendant had the right to reduce plaintiff's commissions, that right was conditional only, and the specified conditions justifying reductions did not arise. If, as the majority opinion holds, the right to change existed and was absolute, it was exercised in bad faith.

The pertinent language in the last paragraph of Exhibit II is:

> "The schedules are subject to change without advance notice and we reserve the right * * * to alter them if necessary to meet any unusual conditions not specifically covered."(5)

By all canons of construction, the contractual price schedules to the agent on Exhibit II could not be in-

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(5) The omitted language, giving it the right to act as final authority on the interpretation of the agreement, is not relied on by defendant. This provision is void. Williston on Contracts, Rev. Ed., Vol. 6, Sec. 1725; *Walsche* v. *Sherlock,* 110 N. J. Eq. 223, 159 A. 661 (1932); Corpus Juris Secundum, Vol. 17, Sec. 229, p. 603; *Ballinger Oil Mill, Inc.,* v. *Southern Cotton Oil Co.,* 37 F. (2d) 472 (C. C. A. 5, 1930); *Brucker* v. *Georgia Casualty Co.,* 326 Mo. 856, 32 S. W. (2d) 1088 (1930); *Wallace* v. *Brotherhood of Locomotive F. & E.,* 230 Iowa 1127, 300 N. W. 322 (1941); *Long* v. *Chronicle Pub. Co.,* 68 Cal. App. 171, 228 P. 873 (1924).

creased unless unusual conditions not then present and presumably not then known made such changes necessary. By law and by syntax the last clause of this paragraph qualified and limited the meaning of the first, if by the first the right to change was absolute. *Union Fur Shop, Inc.*, v. *Max Melzer, Inc.*, (N. J. Ct. of Errors, 1943) 29 A. (2d) 873, 875.

The majority opinion (R. 430-431) is not clear whether it rules defendant's right to reduce commissions as conditional or absolute. But in either event the result must be the same. If it was conditional, no new or unusual condition arose. If it was absolute, the manner in which it was exercised was bad faith and fraud as matter of law. In New Jersey, and everywhere, the relationship between principal and agent is one of mutual trust and confidence *Smyth Sales, Inc.*, v. *Petroleum Heat & Power Co.*, (3 Cir., interpreting N. J. law, 1942) 128 F. (2d) 697, 700-701. In transactions between persons occupying such relations, the burden of proof is upon the person who has acquired an advantage to show good faith. *Hall* v. *Otterson*, 52 N. J. Eq. 522, 528. In every contract there is an implied covenant that neither party will do anything, even in the exercise of a right, which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[6] Judge Sanborn's opinion justifies the drastic commission reduction because (1) when the agency agreement was entered into the country was not yet at war; (2) defendant's product was needed for national defense; (3) the time was approaching when the

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(6) *Manners* v. *Morosco*, 252 U. S. 317 (1920); *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 263 N. Y. 79, 188 N. E. 163 (1933); Williston, Contracts, Rev. Ed., Vol. 3, §670; *Uproar Co.* v. *Natl. Broadcasting Co.*, 81 F. (2d) 373 (1 Cir., 1936); *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N. Y. 50, 19 N. E. (2d) 676, 678 (1939); *Schaefer* v. *Fulton Iron Works Co.*, 158 S. W. (2d) 452 (Mo. App., 1942); *McCombs* v. *Fid. & Casualty Co. of N. Y.*, 231 Mo. App. 1206, 89 S. W. (2d) 114 (1936).

services of salesmen were no longer needed; (4) defendant was subject to renegotiation and taxes upon its profits.

It is true all 10,800 units ordered by Standard were by Standard sold to the government (Stip., Par. (11), R. 135). But in May, 1941, defendant had been in war business for approximately two years (R. 195-196). It had been selling extinguishers for war purposes since 1939 (R. 177). When Exhibits IV and V were promulgated conditions were no more "unusual" than in May and July, 1941. It is true that defendant's business increased substantially after Pearl Harbor; but that was a mere extension in degree of the same conditions which had obtained since September, 1939.

Nowhere in any document of defendant's preparation was it stated or implied that defendant reserved the right to reduce commissions below the contract schedules and thereafter measure them by the effort involved. Neither principal nor agent in a contract may depart from his agreement or change the contract if the result obtained by the agent was brought about by less or greater effort than the parties anticipated.[7]

Renegotiation was a phantom excuse. Exhibit IV (R. 86-87), which cut plaintiff's commissions in half, was promulgated effective August 1, 1941. Exhibit V (R. between pp. 86 and 87), which reduced the commission on more than 8,000 Model 20's from $6.54 each to $0.52 each, was promulgated March 12, 1942. The original Renegotiation Act was passed April 28, 1942 (Act of April 28, 1942,

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(7) Plaintiff earned its commission under the Standard contract, not alone by what it did in producing Exhibit III and securing these orders, but also as the result of hard and painstaking work and loyalty to defendant over many profitless years (R. 402, 403, 404, 405, 417-418). Moreover, if quantity orders were easier to get they were also more easily and more cheaply filled. Yet defendant, while it reduced the prices generally to customers on large quantity orders, still maintained its contract prices with Standard.

c. 247, Tit. IV, §403, 56 Stat. 245, U. S. C. A. Tit. 50, App. Sec. 1191). Moreover, during the entire period in question, 95 per cent of defendant's sales were directly to governments and only 5 per cent through agents to private persons (R. 177). Obviously, defendant's taxes would furnish no legal reason for impairing defendant's obligations under the contract. Nowhere in the Renegotiation Act of April 28, 1942, is the right given, or remotely implied, to a subcontractor, who is or may be renegotiated, to re-renegotiate his agents through whom his products are sold. That right "is an attribute of sovereignty." Yet this is precisely what Judge Collet found the defendant undertook to do (Concl. 19, R. 37).

Bad Faith.

If plaintiff's commissions had become too high, defendant had an easy way and an absolute legal right, under Exhibits I, II and III, to reduce the commissions by reducing Standard's scheduled prices. And this could have been done without affecting defendant's net prices to itself. By this method the purchaser and the ultimate consumer would have benefited and defendant would have suffered not a dollar in loss to its own net prices or in its profits. Defendant did not do this. It did not pass on to the purchaser the drastic commission reductions promulgated by Exhibit IV, and particularly Exhibit V. It siphoned the difference into its own pocket. In the single instance of the Standard contract it swelled its own profits by at least $107,000. When it recomputed plaintiff, defendant made like "adjustments" in all other cases. Walton-Viking was "one of the smaller cases at issue" (R. 220). The record draws the curtain somewhat on how defendant fared as the result of recomputing and reducing distributors' commissions on 300 annual purchase contracts and

ballooning its own profits by the amount of the reductions.

Between 1939 and 1943 there were two stock splitups in defendant, one of five for one and one of two for one (R. 179). In 1943 each stockholder owned ten shares for one share held before December, 1939 (R. 180). After the ten for one splitup the dividends were $2 per share, equal to $20 per share on the capital stock of the company before December, 1939 (R. 187). The company paid $2 per share dividend in 1942, after it had given back to the government $6,600,000 on renegotiation (R. 187), and $2 per share in 1943, after it had set aside a reserve of $8,500,000 out of its profits against renegotiation on its 1943 business (R. 187). The inference is fair that defendant's net profits for 1942, after taxes, and before renegotiation, were about $7,660,000 (R. 187).

In other words, defendant utilized its right to reduce commissions, not for the benefit of the purchaser, the ultimate user, the taxpayer, the government, or its agents, but to swell its own profits in exact proportion to the amount of the reduced commissions. If defendant had exercised the right by reducing the contract prices to Standard, there would have been no "excessive" commissions, the purchaser would have benefited and the security of defendant's own net prices would not have been assailed or threatened.

Defendant was not interested in the taxpayer. It was not interested in its customers. It was not interested in its agents. Its real motives were plain. By forcing its customer to pay the full contract price without diminution defendant could maintain its gross sales at the highest possible figure. At the same time, by reducing commission rates, it could increase its net profits to the highest possible figure. Then, if renegotiated, either on the basis of sales or profits, or both, it would be in the best possible

position. Measured by any standard, defendant, in recasting "plaintiff's commission account to its own financial advantage" (Judge Johnsen, R. 432), cancelled its claims to good faith.

The effects of Exhibits IV and V disclose that defendant, having exhorted and encouraged plaintiff to solicit new annual purchase contracts and thereby make full use of "one of the finest sales tools offered you in recent years" (R. 128), penalized plaintiff for obtaining that contract. Three hundred Model 15's were ordered by Standard March 9, 1942. At that time a general price reduction had reduced Standard's contract price on 15's from $43.75 per extinguisher to $36.16. (The only reduction to Standard was on this 300.) Exhibit IV (in the 750 bracket where defendant placed plaintiff) had already increased the price to plaintiff to $39.20 (Stip., R. 131; Exhibit IV, R. beg. 86). Thus defendant, by March, 1942, had cut off all commissions on 15's by increasing the price to plaintiff more than $3 above the current price to customers. This was one of the "adjustments favorable to plaintiff" referred to in Judge Sanborn's opinion (R. 427).

Exhibit V was frankly aimed at agents who had produced annual purchase contracts. It changed the method of fixing commissions to a flat sum per extinguisher, the commission diminishing as the quantity increased (R. between pp. 86 and 87). Defendant, after all 10,800 extinguishers had been ordered by Standard, in recomputing plaintiff's commissions on 8,140 20's, treated each order as a part of the whole and fixed plaintiff's commissions at $0.52 per extinguisher by applying the 1,000 quantity bracket in Exhibit V. The inference is fair that it cost plaintiff substantially more than $0.52 per extinguisher to store them in its shop, deliver them as requested, expedite

shipments and generally to service the orders (R. 405, 406). Defendant justified its right to change commissions on optional orders upon the ground that each order was a separate transaction, an ordinary order. But for the purpose of reducing plaintiff's commissions to the minimum, $0.52 per unit, it treated all orders under the annual purchase contract as a part of one transaction. One example will suffice: On April 28, 1942 (Op. R. 427), Standard ordered 100 Model 20's. If that were treated as a separate order, plaintiff's commission under Exhibit V would have been more than $600 (Exhibit V, R. 86-87). But in defendant's recomputation, it treated this order as a part of the annual purchase contract, added it to the 8,040 previously purchased and credited plaintiff on that sale with the sum of $52 (Stip., Par. (10), R. 134).

Conclusion.

For all of the foregoing reasons, it is respectfully prayed that a writ of certiorari issue.

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